Dana M. Susman, Esq.
Kane & Kessler, P.C.
Continental Plaza
433 Hackensack Avenue
Hackensack, New Jersey 07601-6319
201/487-2828

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH STECHLER; GAIL STECHLER; AND STECHLER & CO., INC. F/K/A JOSEPH STECHLER & CO., INC., **PLAINTIFFS,** **v.** **SIDLEY AUSTIN BROWN & WOOD, L.L.P.; R.J. RUBLE; ALPHA CONSULTANTS, INC.; ALPHA CONSULTANTS, L.L.C.; IVAN ROSS; IRWIN ROSEN; GRANT THORNTON, L.L.P.; GRANT THORNTON INTERNATIONAL; ISRAEL PRESS; REFCO CAPITAL MARKETS, LTD.; AND REFCO CAPITAL LLC,** **DEFENDANTS.**	**Civ. Action No. 2:05-cv-03485-HAA-GDH**

PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION TO REMAND

Plaintiffs file their Brief in Support of Motion to Remand and, in support thereof, show as follows:

Dockets.Justia.com

I.

INTRODUCTION

On July 11, 2005, Sidley Austin Brown & Wood, LLP ("Brown & Wood Defendants") removed this case from the Superior Court of the State of New Jersey, Law Division Bergen County (the "Removal"). The basis on which the Brown & Wood Defendants removed this case was 28 U.S.C. § 1331. Because this statute does not provide this Court with jurisdiction over this case involving allegations of wrongdoing under state law for the sale of a tax shelter, Plaintiffs have filed their motion to remand, seeking remand of this case to the state court from which it was removed.

II.

ARGUMENT AND AUTHORITIES

The party removing the action bears the burden of establishing federal jurisdiction. *Steel Valley Authority v. Union Switch and Signal Division*, 809 F.2d 1006, 1010 (3rd Cir. 1987). Further, "the removal statute should be strictly construed" and if there is any doubt as to the propriety of removal that case should not be removed. *Brown v. Francis*, 75 F3d. 860, 865 (3rd Cir. 1996).

A. THIS CASE RAISES NO SUBSTANTIAL FEDERAL QUESTIONS

1. Removal of this Matter under 28 U.S.C. § 1441 was Improper because there are no Federal Issues Actually in Dispute

The Brown & Wood Defendants claim that removal is proper in this case under 28 U.S.C. § 1441 because Plaintiffs' claims depend "on proving that Defendants' alleged statements were false, requiring construction of complicated federal tax laws and regulations." *See* Removal at ¶ 4. As support for their position, the Brown & Wood Defendants cite to the United States Supreme Court's recent decision in *Grable & Sons Metal Prods., Inc. v. Darue* Eng'g *& Mfg.*, 125 S.Ct. 2363 (2005). As shown below, the Brown & Wood Defendants' reliance upon *Grable*, is misplaced because there are no substantial and contested federal tax issues actually in dispute in this action.

In *Grable*, the Court found that federal jurisdiction existed over a removed quiet title action originally filed in state court between two non-diverse parties, challenging the sufficiency of notice of seizure that the I.R.S. provided to the plaintiff under § 6335(a) of the tax code. Importantly, several times throughout the opinion, the Court explained that, in order for there to be federal jurisdiction, the federal issue must actually be disputed or contested. For example, the Court explained that in cases where jurisdiction has been found that "it has in fact become a constant refrain in such cases that that *federal jurisdiction demands not only a contested federal issue*, but a substantial one, indicating a serious federal interest in claiming advantages thought to be inherent in a federal forum." *Grable* at 2367 (emphasis added).

Likewise, the Court also noted that merely because a federal issue may be present in an action that fact, by itself, is not sufficient for "opening federal courts to any state action embracing a point of federal law. Instead, the question is, does a state-law claim necessarily raise a stated federal issue, *actually disputed and substantial*, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id* at 2368. Finally, in footnote 3 of the Opinion, citing to an earlier quiet title case, the Court made clear that, when there is no dispute about a substantial federal issue, jurisdiction is lacking:

> The quiet title cases also show the limiting effect of the requirement that *the federal issue in a state-law claim must actually be in dispute to justify federal-question jurisdiction*. In Shulthis v. McDougal, 225 U.S. 561 (1912), this Court found that there was no federal question jurisdiction to hear a plaintiff's quiet title claim in part *because the federal statutes on which title depended were not subject to "any controversy respecting their validity, construction, or effect*." Id., at 570.

> As the Court put it, the requirement of an actual dispute about federal law was "especially" important in "suit[s] involving rights to land acquired under a law of the United States," because otherwise "every suit to establish title to land in the central and western states would so arise [under federal law], as all titles in those States are traceable back to those laws."

Id., at 569-570. *Grable* at 2369 (emphasis added). In this action, while some of Plaintiffs' state-law claims involve I.R.S. Notice 1999-59, I.R.S. Notice 2000-44, and certain federal regulations and case law, there is no substantial dispute or controversy regarding the content of those notices or their "validity, construction or effect."[1] Thus, the alleged federal issue is not contested as required by *Grable*. In any event, these issues are not as substantial as presented in *Grable*, where the federal issue was the sole issue in the case. Accordingly, there is no federal issue in dispute that would support federal jurisdiction in this action and removal on that basis was clearly improper.

2. **Federal Jurisdiction in this Matter is not Consistent with Congressional Judgment about the Sound Division of Labor between State and Federal Courts**

As shown, *supra*, jurisdiction does not exist in this matter because there is no dispute or controversy about a substantial federal issue, and therefore, removal on this basis was improper. Alternatively, even if the Brown & Wood Defendants could make such a showing, removal would still be improper because jurisdiction in this matter would not be consistent with Congressional judgment about the sound division of labor between state and federal courts.

In *Grable*, the Court made clear that even if a defendant could show that the action involved a substantial federal issue that was in dispute, that such a showing did not guarantee that the action was one that should be decided in federal court. It explained that "even when the

[1] Importantly, the IRS positions contained in IRS Notice 1999-59 and IRS Notice 2000-44 have been enacted as IRS Regulations giving them the authority of law. *See* Plaintiffs' Complaint (attached to the Removal; hereinafter "Complaint") at ¶¶ 140-141. Therefore, there is no dispute as to issues of federal law as the law is established by these regulations.

state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Grable* at 2367.

The Court then discussed in detail its earlier holding in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), which had considered whether a state tort claim brought under Ohio law based in part on the allegation that the defendant drug company had violated a federal misbranding prohibition conferred federal jurisdiction. In finding that it did not, the Court in *Merrell Dow* assumed that federal law would have to be applied to resolve the claim, but after closely examining the strength of the federal interest at stake and the implications of opening the federal forum, held federal jurisdiction unavailable. *Grable* at 2369-70. The Court further explained:

> For if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would have meant a tremendous number of cases.
>
> One only needed to consider the treatment of federal violations generally in garden variety state tort law. "The violation of federal statutes and regulations is commonly given negligence per se effect in state court proceedings." Restatement (Third) of Torts (proposed final draft) § 14, Comment a. See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts, §36, p. 221, n.9 (5th ed. 1984) ("[T]he breach of a federal statute may support a negligence per se claim as a matter of state law" (collecting authority)). *A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts.*

Grable at 2370-71 (emphasis added).

The same reasoning applies to this action. Plaintiffs have asserted garden variety state common law theories of recovery—malpractice, fraud and the like--against the defendants.

While the Defendants' conduct in failing to properly advise the Plaintiffs about the implications and effect of I.R.S. Notice 1999-59, I.R.S. Notice 2000-44, and the regulations enforcing those Notices upon their tax strategy will be at issue in resolving those claims, that does not mean that Congress envisioned opening the flood gates of federal jurisdiction to these state law claims merely because federal regulations and statutes will be examined. These state law causes of action should be decided in state courts, which traditionally resolve these types of claims. For this additional reason, § 1331 jurisdiction does not exist and removal on that basis was clearly improper.

Finally and perhaps most importantly, in considering "[the] congressionally approved balance of federal and state judicial responsibilities," the *Grable* Court also indicated that certain other factors, not present here, were key to its decision. These include:

1. Not only was the meaning of a federal statute in dispute, "it appears to be the only legal or factual issue contested in the case." *Grable* at 2368. This, of course, is not true here, as the primary issues are not the meaning of federal tax law, but whether the advice given to the Plaintiffs was negligent or fraudulent and other similar state law issues.

2. The Government had an interest in the outcome of the controversy, as it could determine "the ability of the IRS to satisfy its claims from the property of delinquents." *Id.* Again, such is not true here, as the IRS has already made its position on the tax shelter at issue clear and the Plaintiff-taxpayers have already been assessed and paid the IRS. *See* (Complaint at ¶ 146).

3. "[B]ecause it will be the rare state title case that raises a contested matter of federal law, federal question [over this case]... will portend only a microscopic effect on the federal-state division of labor." *Id.* Here, the Brown & Wood Defendants did numerous

transactions with numerous individuals. Numerous suits are pending throughout the country on tax shelter transactions done by the Brown & Wood Defendants and others;[2] many more will be filed. All of the civil litigants in those cases have plead claims similar to those alleged in this case—namely that the tax shelters they were sold were defective under federal tax law and that those who sold them were either negligent or fraudulent in selling it to them anyway. Thus, a ruling here would indeed open the proverbial "floodgates," allowing the removal or filing of claims brought by *hundreds* of tax shelter purchasers into federal courts across the country. Indeed, carried to its logical extreme, the Brown & Wood Defendants' argument would allow any state tort claim, such as for malpractice, involving as its subject matter some federal statute (e.g., tax law, FDA law), to be removed to federal court or brought there in the first instance. Accordingly, unlike the rare case that the *Grable* Court would allow into federal court despite the lack of a federal cause of action, the construction of *Grable* the Brown & Wood Defendants seek would fill the federal courts with state law tort claims.

III.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court GRANT their Motion to Remand and remand this case to the State court.

---

[2] *See* Affidavit of David R. Deary in Support of Plaintiffs' Motion to Remand attached hereto as Exhibit "A" at ¶ 2.

Respectfully submitted,

KANE KESSLER, P.C.

Dana M. Susman, Esq.
Kane & Kessler, P.C.
Continental Plaza
433 Hackensack Avenue
Hackensack, New Jersey 07601-6319
201/487-2828

ATTORNEYS FOR PLAINTIFFS

DAVID R. DEARY
W. RALPH CANADA, JR.
J. BRIAN WILLIAMS
STEWART CLANCY
JEVEN R. SLOAN
DEARY MONTGOMERY DEFEO
& CANADA, L.L.P.
Chateau Plaza, Suite 1565
2515 McKinney Avenue
Dallas, Texas 75201
(214) 292-2600
(214) 739-3879 (fax)
LEAD ATTORNEYS FOR PLAINTIFFS

WHATLEYDRAKE, LLC
JOE R. WHATLEY, JR.
OTHNI LATHRAM
2323 2nd Avenue North
Birmingham, Alabama 35203
(205) 328-9576

ATTORNEYS FOR PLAINTIFFS

CORYWATSON CROWDER &
DEGARIS
ERNEST CORY
2131 Magnolia Avenue
Birmingham, Alabama 35205
(205) 328-2200

ATTORNEYS FOR PLAINTIFFS